No. 210

In the Supreme Court of the United States

October Term, 1941

R. G. Tatum,
Petitioner,

v.

Guy T. Viskniskki,

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 230

R. G. TRIPPETT, AS TRANSFEREE OF TEXOTA CORPORATION, DISSOLVED, ET AL., PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 310–315) is reported at 118 F. (2d) 764. The findings of fact and opinion of the Board of Tax Appeals (R. 261–271) are reported at 41 B. T. A. 1254.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 1, 1941 (R. 315). A petition for

rehearing was denied by the Circuit Court of Appeals on May 14, 1941 (R. 323). The petition for a writ of certiorari was filed July 2, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Texota Corporation owned and operated an oil and gas lease. Intending subsequently to liquidate the corporation, two of the stockholders, individual petitioners herein, consummated an agreement with the other stockholders by which the former acquired all of the corporation's stock. Immediately after entering into this agreement, these two stockholders, who were also the corporation's officers and directors, contracted to sell the lease. The contract was signed by the two stockholders as individuals; their intent was to deal as individuals. Thereafter, the corporation conveyed the lease to one of these two stockholders, its president, and, later on the same day, the two stockholders conveyed the lease to the purchaser pursuant to the contract.

The question is whether the sale of the oil and gas lease to the purchaser was a sale by the Texota Corporation which resulted in taxable gain to it, or a sale by the stockholders of Texota Corporation after distribution to them in liquidation, taxable only to the two stockholders.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Treasury Regulations involved are printed in the Appendix, *infra*, pp. 11–15.

STATEMENT

The Commissioner of Internal Revenue determined deficiencies of $20,773.61 in income taxes and $7,223.96 in excess profits taxes of Texota Corporation for the fiscal year ended July 31, 1935 (R. 40–46). Since Texota Corporation had been dissolved, the Commissioner also asserted liabilities against R. G. Trippett and A. H. Meadows, as transferees of Texota Corporation, for the full amount of these deficiencies (R. 11–17, 25–31). The deficiencies in income and excess profits taxes determined against Texota Corporation resulted from adding to income of the corporation the sum of $151,080.82 as "Profit from sale of oil, gas, and mineral leases" (R. 42). Texota Corporation appealed to the Board of Tax Appeals contesting this determination (R. 35–40), while Trippett and Meadows, admitting their liability as transferees (R. 34–35), also challenged the correctness of the Commissioner's determination of deficiencies against the corporation (R. 7–11, 20–24). The Board of Tax Appeals sustained the Commissioner's determination (R. 261–273).

Texota Corporation, which was incorporated under the laws of Texas, owned and operated an oil

and gas lease. In December 1934, R. G. Trippett and A. H. Meadows owned a majority of the corporation's Class B stock; they were also directors and officers of the corporation[1] (R. 51, 52–54, 91–133, 263). Early in that month, Trippett informed S. A. Cochran, broker, that he and Meadows owned a one-quarter interest in the oil and gas lease, that they might consider selling it, and that there was a possibility of their acquiring the entire interest in the property (R. 295). Before preliminary negotiations between Cochran and the Rancho Oil Company, as prospective purchaser, resulted in an offer by the latter, on December 17, 1934, Trippett and Meadows offered to purchase from the other stockholders all the stock of the corporation (R. 57–58, 206–207, 264). A counter-

[1] The corporation's capitalization was represented by an equal number of shares of Class A and Class B stock. The holders of the Class B stock, at least in the early history of the Corporation, had the right to elect two of the three directors while consent of the holders of a majority of the Class A shares was a condition to disposition of the corporation's property (R. 49, 65, 262–263). But dissension marked the corporation's affairs (R. 52), and after Trippett and Meadows acquired a majority of the Class B stock, the stockholders voted to amend the articles of incorporation by eliminating the distinction between Class A and Class B stock (R. 52, 73–84). But at the next annual meeting, Trippett and Meadows elected themselves directors and then as president and secretary-treasurer, respectively. The dissenting stockholders elected other directors, who in turn elected other officers (R. 52–54, 91–133). But petitioners do not contend that Trippett and Meadows were not directors and officers at the time of the transactions here in question.

proposal by these stockholders was accepted by Trippett and Meadows on December 19, 1934 (R. 58, 207–209, 264).[2] In purchasing this stock and becoming owners of all the capital stock of the corporation, Trippett and Meadows intended later to liquidate the corporation (R. 264).

Meanwhile, the earlier negotiations for the purchase of the lease by the Rancho Oil Company continued. On December 20, 1934, Trippett and Meadows agreed to sell, and that company agreed to purchase, the oil and gas lease for $165,000 (R. 265). Throughout their negotiations with the Rancho Oil Company, Trippett and Meadows held themselves out as individuals desiring to sell the lease; in the contract of sale, they were individually named as the sellers (R. 264–265).

After Trippett and Meadows had completed the contract to buy the outstanding stock of Texota Corporation, they prepared a consent of the stockholders to the dissolution of the corporation. This consent was executed by Meadows on December 27, 1934, but it found its way into the files of the Rancho Oil Company instead of being sent to the Secretary of State in Austin, Texas. Since it was never filed, this document had no legal effect (R. 265–266, 303–304). The corporation was not for-

[2] Settlement was made on December 31, 1934, when Trippett and Meadows received the stock, paid for it, cancelled all of the certificates of stock, and issued new certificates in the name of Meadows, for Meadows and Trippett (R. 286, 304).

mally dissolved until August 14, 1936 (R. 62, 257–260, 267).

At meetings of the stockholders (R. 60, 224–228) and directors (R. 60, 228–231) on January 5, 1935, Meadows as president of Texota Corporation was authorized to convey its oil and gas lease to Meadows "upon such terms and for such considerations as to the President may seem fit and proper" (R. 225, 229). On that date, the corporation conveyed its oil and gas lease to Meadows in consideration of the sum of $10 "and other good and valuable considerations, the receipt of all of which is hereby acknowledged and confessed" (R. 60, 220–224, 266). No actual consideration passed from Meadows to Texota Corporation (R. 266, 286–287).

On the same day, January 5, 1935, Meadows and Trippett executed a conveyance of this lease to the Rancho Oil Company, attaching to it a draft drawn on the Rancho Oil Company for $165,000 (R. 60–61, 266). The Texota Corporation wound up its business affairs later in 1935, and its remaining assets were distributed to its two stockholders, Meadows and Trippett (R. 267).

ARGUMENT

The question here presented turns simply upon the facts of this case. The decision of the court below is fully supported by the facts, is not in conflict with any other decision, and is correct.

Trippett and Meadows negotiated a sale of property of Texota Corporation while they were its

officers and directors. The purchaser necessarily was aware at the time of acquisition of the lease that the lease belonged to the corporation and that the purchase was from the corporation (R. 268). Because of their fiduciary relationship as officers and directors of the corporation, the Board of Tax Appeals and the court below properly held that the sale of the oil and gas lease owned by Texota Corporation was a sale by the corporation. Cf. *Drury* v. *Cross*, 7 Wall. 299; *Wardell* v. *Railroad Co.*, 103 U. S. 651; *Davis* v. *Nueces Valley Irrigation Co.*, 103 Tex. 243, 248; *Dollar* v. *Lockney Supply Co.*, 164 S. W. 1076, 1079 (Tex. Civ. App.); *Canadian Country Club* v. *Johnson*, 176 S. W. 835, 842 (Tex. Civ. App.); *Peerless Fire Ins. Co.* v. *Reveire*, 188 S. W. 254 (Tex. Civ. App.); *Smith* v. *Smith*, 213 S. W. 273 (Tex. Civ. App.); *Billings* v. *Shaw*, 209 N. Y. 265, 279–283.

The fiduciary relationship of Trippett and Meadows at the time the sale of the Texota lease was negotiated, crucial to the decision below (R. 313), removes any ground for asserting conflict with the decisions of the state courts of Texas cited by petitioners (Pet. 15, 17).[3] These decisions support petitioners' contention that Trippett and Meadows could under state law validly contract to sell prop-

[3] *Austin* v. *Wortham*, 298 S. W. 620 (Tex. Civ. App.); *Olsen* v. *Homestead Land Co.*, 87 Tex. 368; *Hufstutler* v. *Grayburg Oil Co.*, 48 S. W. (2d) 591 (Comm. of Tex. App.); *Tison* v. *Smith*, 8 Tex. 147; *American Nat. Bank* v. *Haggerton*, 250 S. W. 279 (Tex. Civ. App.); *Standard Underground Cable Co.* v. *Southern Ind. Tel. Co.*, 134 S. W. 429 (Tex. Civ. App.).

erty which they did not then own. But they do not involve a case in which an officer or director of a corporation, purporting to act in his individual capacity, attempts to negotiate a sale of the property of his corporation.[4]

It is obvious that no general principle of law can definitively resolve the type of issue here presented. Whether a disposition of property in the late history of a corporation is a sale by that corporation or a sale by its stockholders after distribution to them in liquidation must necessarily depend not on any single fact but upon all the surrounding circumstances and combination of facts. For this reason it is unnecessary to discuss in detail the federal income tax cases cited by petitioners as in conflict with the decision of the court below[5] (Pet. 12–15). It is sufficient to observe that in none was there a sale of a corporation's assets by its officers and directors. In none was the sale itself in issue nor was there involved the question of who was the

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[4] The decision in *American Preservers' Co.* v. *Norris*, 43 Fed. 711 (C. C., E. D. Mo.), cited by petitioners as in conflict with the decision below (Pet. 18), is irrelevant to the question involved in this case.

[5] *Holmby Corp.* v. *Commissioner*, 83 F. (2d) 548 (C. C. A. 9); *Gossett* v. *Commissioner*, 59 F. (2d) 365 (C. C. A. 4), rehearing denied, 60 F. (2d) 484; *Kennemer* v. *Commissioner*, 96 F. (2d) 177 (C. C. A. 5); *Tate* v. *Commissioner*, 97 F. (2d) 658 (C. C. A. 8), certiorari denied, 305 U. S. 639; *Canady, Inc.* v. *Commissioner*, 76 F. (2d) 278 (C. C. A. 3), certiorari denied, 296 U. S. 612; *Commissioner* v. *Straub*, 76 F. (2d) 388 (C. C. A. 3); *Novo Trading Corp.* v. *Commissioner*, 113 F. (2d) 320 (C. C. A. 2).

seller. In all but one of the cases cited by petitioners (Pet. 13), the question was whether the distribution received by a shareholder from his corporation constituted an ordinary or a liquidating dividend; the decisions in those cases are in no way inconsistent with the decision of the court below. The remaining case of this group cited by petitioners, *Novo Trading Corp.* v. *Commissioner,* 113 F. (2d) 320 (C. C. A. 2), while involving the issue of the income tax liability of a corporation, rather than that of a stockholder, involved a different question and a distinct factual situation from that here presented.[6]

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[6] The *Novo Trading Corp.* case may be summarized as follows: The Novo Trading Corporation began winding up its affairs in September 1931. In June 1932, after all of its obligations had been paid and most of its assets had been disposed of, the three stockholders of the corporation, who also were its only officers and directors, entered into a written agreement for dissolution of the corporation and liquidation of its affairs; the stock certificates were cancelled; a certificate of dissolution, which was not filed with the proper state official, was executed; and provision was made for final distribution of assets among the stockholders. Such assets included a claim for refund of taxes previously paid to the United States. The refund was allowed and paid in 1934, and the question was whether the amount of the refund represented income to the corporation. The court held that the claim had already been distributed to the shareholders, and that the refund therefore did not represent income to the corporation. The acquisition of the Novo Trading Corporation's assets by its stockholders, in marked contrast to the decision here, was not a transaction which was an integral step in the plan to realize upon those assets.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. It is fully supported by the facts and the law and is not in conflict with any other decision. The petition should be denied.

Respectfully submitted.

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